Health Care and Retirement Corp. of America d/b/a Heartland of Lansing Nursing Home *and* United Food and Commercial Workers International Union, Local Union 23, AFL–CIO–CLC. Cases 8–CA–22647 and 8–CA–22795

April 21, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On July 23, 1991, Administrative Law Judge Richard A. Scully issued the attached decision.[1] The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

1. The judge found that the Respondent's rule on solicitation[3] was overly broad and thus violated Section 8(a)(1) of the Act. The Respondent has excepted to this finding, arguing, inter alia, that it did not have a fair opportunity to address that issue because it was not raised by the General Counsel until its posthearing brief to the judge. We find no merit in this exception.

The General Counsel's original complaint alleged that the maintenance of the Respondent's rule on solicitation was unlawful. In its posthearing brief to the judge, the General Counsel amended the complaint to conform to the language of the rule contained in the Respondent's employee handbook, which had been introduced into evidence as General Counsel's exhibit. In addition, we note that the Respondent, in its posthearing brief to the judge, admitted that its rule on solicitation in effect during all relevant times was as contained in its employee handbook. The Respondent thereby acknowledged its understanding of the particular language at issue in the no-solicitation rule allegation.

2. The judge found that Supervisor Mazzulli's April 20, 1990 written warning to employee Reed for excessive absenteeism, 8 days after the Board election, violated Section 8(a)(3). The Respondent has excepted to this finding and contends that three other employees were also issued warnings for absenteeism by Mazzulli at approximately the same time as Reed, but that the judge only found that the warning to one of the three, Persiani's, was given to ''mask its unlawful action against Reed.'' The Respondent argues that the record thus does not support a finding that Reed was singled out for an absenteeism warning in violation of the Act. We find no merit in this contention.

We agree with the judge, for the reasons he stated, that the General Counsel has made a prima facie showing that the warning to Reed was motivated by antiunion considerations and that the Respondent has not established that it would have taken the same action against Reed in the absence of her prounion activities. Contrary to the Respondent's contention, the absenteeism warnings to the other employees do not negate the finding that the Respondent acted out of antiunion animus toward Reed. In this regard, we note that all of these warnings were issued after the election, that the credited testimony established that the Respondent's policy of issuing warnings had not been regularly enforced prior to the organizing campaign, and that, indeed, no evidence was presented that any warnings had been issued prior to this time. In addition, there was no uniform correlation between the timing of these warnings and the timing of the employees' violations.[4]

It is readily apparent why the judge focused on Persiani rather than the other employees who received warnings in determining the motive for issuing Reed a warning. As the Respondent's election observer, Persiani presumably was not a supporter of the Union. Thus a warning issued to her would at first blush ap-

[1] On September 25, 1991, subsequent to the judge's decision and the Respondent's filing of exceptions to that decision, the Charging Party requested withdrawal of its election objections filed in Case 8–RC–14289. On October 23, 1991, the Board granted the Charging Party's request and severed that case from Cases 8–CA–22647 and 8–CA–22795, decided herein, and remanded it to Region 8 for further appropriate action.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board' established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by: Supervisor Messer's questioning employee Reed about the Union and threatening that Reed's support for the Union would ruin their friendship; Supervisor Messer's removing prounion campaign literature from the employee breakroom; Supervisor Malone's accusing employee Susi of harassing other employees; Supervisors Malone's and Lyons' accusing employee Susi of calling these other employees ''liars''; and, Supervisor Lyons' questioning Susi about the scabies rumor.

[3] The following rule on solicitation was contained in the Respondent's rules booklet:

> II. Soliciting or distributing written materials during work time or in any work area *or* resident care area is not permitted. [Emphasis added.]

[4] We note that the warnings issued to Hall and Jako did closely follow the date of their infractions of the absentee policy (i.e., Hall's warning was issued on April 17 for an infraction of the policy on April 3; Jako's warning was issued on April 23 for an infraction on April 22). However, the warnings issued to both Reed and Persiani did not closely follow the date of the infraction of the policy (i.e., both were in violation of the policy from between 6 and 11 months prior to the issuance of the warnings). Thus, we find that the Respondent's policy of issuing warnings for absenteeism lacked an overall uniform application.

pear to be the strongest evidence that prounion sentiments played no part in the issuance of the warning to Reed. It is noteworthy, however, that the warning to Persiani was issued less than a week after the Respondent had been served with the unfair labor practice charge alleging the issuance of unlawful warnings to employees—a time when the Respondent might be considering its defenses to the allegations. Like the warning to Reed, the warning to Persiani cited conduct that could have supported the issuance of a warning well before the Union came on the scene. Reed's record showed that she had violated the Respondent's announced absenteeism policy nearly 6 months earlier, in October 1989; and Persiani's record showed violations of the policy even earlier—in May 1989, nearly a year before the Respondent saw fit to issue the warning. Accordingly, the judge had ample reason to compare both Reed's and Persiani's situations and to conclude that the Respondent's belated discovery of a need to enforce its absenteeism policy was motivated by its intent to retaliate against outspoken union activist Reed and that Persiani's warning was intended to mask the Respondent's unlawful warning to Reed.

3. The judge further found that the Respondent violated Section 8(a)(3) by failing to return Messenger to the day shift as of May 13, the day after her leave of absence ended. The Respondent has excepted to this finding, arguing, inter alia, that the General Counsel failed to carry the burden of proving Messenger's availability for work on May 13 and thereafter, given the demands of Messenger's class schedule. We find no merit in this exception because the Respondent expressly told Messenger, even before it was aware of any limits on her availability, that it would no longer accommodate her class schedule as it had done in the past. Consequently, Messenger's availability does not affect the merits of the judge's finding.[5] Messenger's availability to work after the expiration of her leave of absence is, however, an issue to be considered in the compliance proceedings in determining any amount of backpay that may be owed to Messenger.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Health Care and Retirement Corp. of America d/b/a Heartland of Lansing Nursing Home, Bridgeport, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[5] We thus agree with the judge that the General Counsel established that antiunion considerations were a motivating factor in the adverse action taken against Messenger, and that the Respondent has failed to establish that it would have taken the same action in the absence of Messenger's protected activity.

Victoria Belfiglio, Esq. and *Mark Carissimi, Esq.*, for the General Counsel.
R. Jeffrey Bixler, Esq., of Toledo, Ohio, for the Respondent.
James R. Reehl, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

RICHARD A. SCULLY, Administrative Law Judge. On charges[1] filed by United Food and Commercial Workers International Union, Local Union 23, AFL–CIO–CLC (the Union), the Regional Director, Region 8, National Labor Relations Board (the Board) issued a complaint and an amended consolidated complaint on June 7 and September 27, 1990, respectively, alleging that Health Care and Retirement Corp. of America d/b/a Heartland of Lansing Nursing Home (the Respondent), had committed certain violations of Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The Respondent filed timely answers denying that it had committed any violations of the Act.

The Union filed a representation petition in Case 8–RC–14289 on February 26, 1990, and a stipulated election was conducted by the Board on April 12, 1990. The Union filed timely objections to conduct affecting the results of the election and on June 14, 1990, the Regional Director issued an order in which he permitted the withdrawal of certain objections and ordered that the remaining objections should be consolidated for hearing with the unfair labor practice cases.

A hearing was held in Bridgeport, Ohio, on November 14, 15, and 16, 1990, at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs filed on behalf of the General Counsel and the Respondent have been given due consideration. On the entire record and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was an Ohio corporation with an office and place of business in Bridgeport, Ohio, where it has engaged in the operation of a nursing home. Annually, in the course and conduct of its business operations, the Respondent derives gross revenues in excess of $500,000 and purchases and receives products valued in excess of $50,000 directly from points located outside the State of Ohio. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] The charge in Case 8–CA–22647 was filed on April 23, 1990, and an amended charge was filed on June 4, 1990. The charge in Case 8–CA–22795 was filed on June 20, 1990, and an amended charge was filed on August 27, 1990.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material the Union was a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In January 1990,[2] the Union began a campaign to organize certain of the Respondent's employees. After the filing of the representation petition on February 26, the Regional Director approved a stipulated election, conducted on April 12, among the Respondent's employees in a unit described as follows:

> All full-time and regular part-time employees including nurses aides, housekeeping aides, dietary aides, laundry aides, and social and activity aides employed by the Employer at its 300 Commercial Drive, Bridgeport, Ohio facility, but excluding all registered nurses, licensed practical nurses, professional employees, office and clerical employees, confidential employees, guards and supervisors as defined in the Act.

Out of approximately 65 eligible voters, 21 votes were cast in favor of the Union and 40 against. The Union filed timely objections to conduct alleged to have affected the outcome of the election. There had been an unsuccessful attempt by the United Steelworkers of America to organize the Respondent's employees during 1988.

B. *Alleged Violations of Section 8(a)(1)*

1. Interrogations and solicitations of grievances

a. *Carol Wagner*

Virginia Messenger was employed by the Respondent at its Bridgeport facility for about 4 years as a nursing aide. Messenger testified that she had been involved in the Steelworkers' attempt to organize the facility and had served on the union organizing committee during that campaign. During the first week of February 1990, Messenger was stopped in the hallway by Carol Wagner, the Respondent's director of nursing. Wagner asked Messenger if she had anything to do with the Union's current organizing campaign as Wagner had heard her name ''all over the place.'' Messenger told Wagner that she had not started this campaign. Wagner responded that she was ''relieved'' to hear it because it was not good that Messenger's name was going all over the facility. Messenger testified that at the time of this conversation she had signed an authorization card for the Union, but had not been active in the campaign. Later, beginning near the end of February, Messenger did become active on the Union's behalf.

Carol Wagner testified that in early February when union cards were being signed she approached Messenger and told her that she had heard there was union activity again, that she was surprised and concerned because she felt the Company had made a lot of positive strides in the 2 years since the last union drive and that she was disappointed that they would have to go through something like that again. Messenger responded that she had seen that big strides had been made and that there were no problems. Wagner testified that she did not ask Messenger if she was involved in starting the union campaign or if she supported the Union and did not ask her any questions at all during their encounter. Wagner testified that she spoke to Messenger about the union campaign because she knew Messenger had been involved in the previous campaign by the Steelworkers, but she denied that she thought Messenger was involved in the new campaign. She said she spoke to several people because she was concerned and wanted to find out why union activity had started up again.

b. *Dennis Lyons*

Irene Berus was employed by the Respondent for 4 years as a dietary aide before leaving its employ on April 24. Berus testified that in March or April, Dennis Lyons, the administrator of the facility, spoke with her in the dining room and gave her some antiunion literature. During the course of their conversation Lyons asked Berus how she was going to vote in the election, told her that they didn't really need a union, and said that if she had any problems she should bring them to him.

Lyons was called as a witness by counsel for the General Counsel but was not asked about this incident. He was not called as a witness by the Respondent and Berus' testimony is uncontradicted.

c. *Robin Messer*

Irene Berus testified that about three times during March Supervisor Robin Messer spoke to her in the dining room or kitchen. Messer gave her antiunion literature and asked her if she was going to vote for the Union. Berus told her she was not. Messer also said that if Berus had any problems she should bring them to her.

Robin Messer was the dietary supervisor at Heartland of Lansing for 2 years and was an admitted supervisor and agent of the Respondent. Messer testified that she attended several meetings concerning the Union's campaign which were conducted by Mike Shuey, a labor consultant retained by the Respondent to direct its response to the campaign. Messer testified that Shuey instructed the facility's supervisors to go out and talk to their employees, to report back who the union supporters were and to solicit from these employees their problems and complaints about their jobs. The supervisors were also directed to take turns conducting surveillance of the employees' activities near the facility. Messer testified that during late February she spoke to a group of five employees while they were feeding patients at lunchtime. She asked what they felt they could get by bringing in a union and told them if they were having any problems they could go to their supervisor. Messer said she spoke to Irene Berus on one or two occasions in March or April, giving her antiunion literature, asking her how she felt about the Union and telling her if she had any problems she could come directly to Messer.

d. *Eleanor Alvarez*

Irene Berus testified that the Respondent's regional manager, Eleanor Alvarez, spoke to her about the Union one time in the dining room in April. Berus first said that Alvarez

[2] Hereinafter, all dates are in 1990 unless otherwise indicated.

asked her if she was going to vote for the Union. On cross-examination, Berus said that Alvarez had not specifically asked her how she was going to vote or if she was going to vote for the Union, but during the course of their 10-minute conversation, in which Alvarez explained why a union wasn't necessary, Berus told her she was not for the Union anyway. Berus testified that Alvarez told her if she had any problems to come to her and ''we'll try to help you and do everything we can for you.'' Eleanor Alvarez was not called as a witness and Berus' testimony in uncontradicted.

e. *Robert Possanza*

Several employee witnesses testified to attending small group meetings during the union campaign which were conducted by Robert Possanza, who has been identified as a corporate vice president from the Respondent's headquarters. Raelynn Susi who was an activity assistant attended a meeting held for the dietary department during late March or early April. Susi testified that Possanza told those attending the meeting that he wanted to find out what the problems were and see if there was anything that the Company could do about solving them. The employees spoke about problems they had with seniority and said that they wanted a wage increase. Another unidentified company representative took notes during the meeting. Possanza did not discuss the Respondent's position concerning the Union during this meeting and did not say that he would do anything for the employees, just that he would see what he could do.

Patricia Sabinski, a nursing aide, testified that some time after the Union's petition was filed she attended a meeting with about eight other aides held by Possanza and another man. Sabinski said that Possanza wanted the employees to tell their ''grievances and gripes about the place,'' the things ''they didn't like about it'' and what they ''were mad about.'' Employees complained that they did not like the way the day shift was being treated, that they were known to be prounion and were being picked on all the time. There were complaints about working conditions and wages. Possanza responded that he couldn't promise them anything but they would look into it and get back with them. No one ever got back to them or followed up on the meeting. Possanza did not give them the Respondent's position concerning the Union at the meeting. Sabinski said that they left the meeting feeling good about it because ''we really thought there would be something done.''

Jane Reed, a nursing aide, testified that during mid-March she attended a meeting of seven employees called by the Respondent which was conducted by two men whose names she was not sure of. The men were there to hear their complaints and gripes and ''to see if they could help us.'' They said they were not going to promise anything, they were there to listen and to see if they could help. The employees indicated they felt they were being picked on because they were prounion, complained about their work load and said that they thought they were underpaid. The men wrote down what the employees complained about. More than once the men told them that they couldn't promise anything, but that ''they wouldn't just write it in their little books,'' that it ''wouldn't just stop there,'' and that they ''would be back.''

Debra Lyle, a nursing aide, testified that she attended a meeting in late March conducted by Possanza and another man. There were about eight nursing aides present. Possanza wanted to know if they had any gripes and said if there was anything they wanted to tell him, he was willing to listen. Employees complained about the way administrator Lyons was treating people, that day-shift employees were getting more work to do because they were prounion and that they deserved more money. Lyle testified that Possanza said that they would talk about what the employees had raised and would get back to them, but that they never heard anything from him.

Kimberly Fatula, a nursing aide, testified that in February, she attended a meeting conducted by Possanza and another man, with about six or seven other aides. Fatula said that the men wanted to hear their gripes and complaints concerning their working conditions and how they felt about their jobs. She had never attended a meeting of this kind prior to the union campaign. The meeting lasted about 15 or 20 minutes and Possanza did not say anything about what the Company thought about the Union or the campaign.

Neither Possanza nor the other company representative at these meetings was called as a witness by the Respondent.

Analysis and Conclusions

I found Messenger to be a credible and persuasive witness. I did not believe Wagner's testimony. She admitted seeking out Messenger for the conversation concerning union activity, but denied that she asked any questions even though her reason for the conversation was to find out why a union was being started again. She was aware of Messenger's involvement in the previous union organizing drive, but denied that she spoke to her concerning the current campaign because she thought Messenger was involved in it. Neither statement rings true. Although Wagner claimed she did not single Messenger out and similarly questioned others, none corroborated that testimony. Based on their demeanor while testifying and the content of their testimony, I credit Messenger over Wagner and find that the conversation occurred as she described it. Considering all of the circumstances surrounding Wagner's questioning of Messenger, as the Board has directed in *Rossmore House*, 269 NLRB 1176, 1177 (1984), I find it reasonably tended to restrain, coerce, and interfere with employees' rights guaranteed by Section 7 of the Act, in violation of Section 8(a)(1). The matter did not arise in the course of a casual conversation. The subject of renewed union activity at the facility was raised by Wagner who sought out Messenger for the specific purpose of making inquiries about it. Messenger was not, at that point, an open or active supporter of this new round of union activity but was known to have been involved in a previous organizing drive. Wagner made clear to Messenger that she was suspected of being involved by saying that she had heard Messenger's name ''all over the place'' in connection with the union activity. Wagner, who was the highest ranking supervisor in the department in which Messenger worked, also made clear her unhappiness and disappointment with the fact that union activity had recurred. By telling Messenger that she was ''relieved'' to hear Messenger was not involved because ''it was not good'' that her name was going all over the facility in connection with

the Union, Wagner implied that if Messenger were involved adverse consequences would result. Wagner's interrogation of Messenger had no legitimate purpose other than to identify who was involved in the renewal of union activity. It makes no difference that Messenger later became involved in the Union's organizing campaign. The test is not whether an employee is coerced but whether the questioning tended to be coercive. I find that it did.

I find that the interrogations of Irene Berus by Dennis Lyons and Robin Messer violated the Act. The credible and uncontradicted testimony of Berus establishes that Lyons asked her how she was going to vote in the election while giving her antiunion literature and soliciting grievances. Lyons was the highest ranking management official at the facility and his inquiry had no legitimate purpose. Messer's testimony corroborated that of Berus that she was asked about her feelings concerning the Union by her supervisor, Messer, in the context of distribution of antiunion literature and solicitation of grievances. Messer admitted that she made her inquiries pursuant to the instructions of Shuey, the consultant who was orchestrating the Respondent's antiunion campaign, to feel out the employees and report back who the union supporters were. I find that the interrogations of Berus by Lyons and Messer were violations under the Board's criteria in *Rossmore House*, supra, but that the evidence fails to establish that Alvarez unlawfully interrogated Berus.

The credible and uncontradicted testimony of Berus establishes that Messer, Lyons, and Alvarez all solicited grievances by telling Berus she could bring any problems or complaints she had to them. Similarly, Messer, on instructions from Shuey, in February, also solicited grievances from several employees while they were feeding patients by telling then they could bring any problems to their supervisor. During a series of small group meetings with employees, Possanza asked employees about their ''gripes,'' ''complaints,'' and ''things they didn't like'' or ''were mad about'' and wrote down their replies.

There is no evidence that the Respondent had a practice of soliciting employees' grievances and complaints before the Union's organizing drive began. On the contrary, Messer's testimony was that it began to do so pursuant to Shuey's instructions as a part of its antiunion efforts. This creates ''a compelling inference'' that the employer is implicitly promising to correct the problems its inquiries turn up. *Reliance Electric Co.*, 191 NLRB 44, 46 (1971). In *Uarco, Inc.*, 216 NLRB 1 (1974), the Board held that it is not necessary for an employer that has solicited grievances to have committed itself to specific corrective action in order for there to be unlawful interference with employees' rights because ''employees would tend to anticipate improved conditions of employment that would make union representation unnecessary.'' Id. at 2. However, because it is not the solicitation of grievances but the promise to correct them that is coercive, the employer can rebut the inference that it has made such a promise. In the instances involving Lyons, Alvarez, and Messer, there was nothing to rebut their implied promises to correct the problems the employees were being asked to bring them. There is evidence that in some but not all of the small group meetings in which Possanza solicited grievances he said that he could not make any promises. Despite these statements, Possanza or his colleague wrote down the employees' complaints and assured them that ''it wouldn't just stop there,'' that they would be looking into and talking about the problems the employees had raised and that they would ''get back to them.'' In similar circumstances, such additional remarks were found to imply a promise to remedy employees' grievances notwithstanding a ''no promises'' disclaimer. *Windsor Industries*, 265 NLRB 1009, 1016 (1982). I find that the Respondent violated Section 8(a)(1) of the Act in each of the instances discussed.

2. Threats, surveillance, and futility of union support

Raelynn Susi testified that on February 26 she signed a union authorization card. On the same day, she informed her supervisor, Activity Director Sandra Malone, that she had decided to support the Union. Malone responded that she wished that Susi had not ''come out with it'' and that Susi had ruined her chances for a job in management not only with the Respondent but she would be unable to get a job ''throughout the Valley'' because when a prospective employer called for a reference they would have to let them know that she was a strong union supporter. Malone showed Susi some newspaper clippings about the Union, said it had struck other nursing homes, that it was ''inevitable'' that it would strike her nursing home, and when it did Susi would be out of a job because she would be replaced and her replacement would not leave as activity jobs were hard to find. Malone also told Susi that the Union couldn't and wouldn't do anything for her or the other employees, that they would start at ground zero, that everything would be negotiated and that they should never expect that the Respondent would ever give more to a union facility than a nonunion facility. Susi testified that in March Malone told her that the total number of hours of the activity staff (Malone and Susi) was going to be cut back from 160 to 155 every 2 weeks and that the entire 5-hour reduction would be taken out of Susi's hours. Susi told Malone that if they tried to do that she would go to Doug Krampert, the union organizer. About 2 weeks later, Malone told Susi that she had discussed the matter with Lyons and they had decided that Susi never should have been working 40 hours a week, but since she had been doing so for the past 2 years it would not be taken away from her.

Susi testified that in March, about a week after she told Malone she was supporting the Union, they had a conversation in the activity office where Robin Messer was also present. Malone gave Susi some antiunion literature and repeated her previous comments about Susi's being unable to find work in the Valley and about the Union, saying, that it was noted for striking, that it was inevitable that it would take the employees out on strike, and that when it did Susi would be replaced and her replacement would not leave. Malone also told Susi that she did not want her to consider them friends, that she wanted nothing to do with her, and that Susi should speak to her only about work and not discuss any personal matters with her. On one occasion after Malone gave her literature and told her she was going to lose a lot because of her prounion stand, she told Susi if she went to the people with whom she had campaigned for the Union and told them she had made a mistake, the Respondent would not hold her brief period of union support against her since she had been a good employee for 9 years.

Robin Messer testified that at one of the meetings she and other supervisors attended concerning the union campaign

prior to the election, Shuey told them that he wanted ''to get'' Susi. He told them that he wanted them to ignore her, to not speak to her or socialize with her, as that would ''make her break down.'' Messer testified to being in the activity office, where she often worked updating patients' dietary charts, on March 8 and heard Malone tell Susi that the Union would not do the employees any good, that if it got in all benefits and wages would be ''up for grabs'' and that they would have to start over.

Malone testified that Susi worked for her for nearly 3 years and that they were friendly coworkers. When Susi told her of her support for the Union, Malone told her that was her right, that she hoped they would keep a pleasant working relationship, and that she would respect Susi's right to do what ever she wanted. Malone denied that Shuey ever said to ignore Susi in an effort to break her down. However, he did say that Susi possibly was supporting the Union to derive a lot of attention and that while they should continue to work with her in a professional relationship, ''maybe we shouldn't be as sociable with her.'' Malone said that she gave Susi literature concerning the Union which the Company had prepared, that she told her the Company would bargain in good faith, but that everything would be negotiable and that you could end up with more, the same, or less. Malone said she did not recall telling Susi that there was no way that the Union would get the employees more than they already had and did not say that benefits would not increase because of the Union.

Jane Reed was actively involved in the Union's organizing campaign, serving on the organizing committee, soliciting authorization cards from employees and handbilling near the facility. She testified that she was a good friend of Supervisor Robin Messer. During February, she and Messer had a conversation about the Union in the presence of employee Eva Neff in which Messer asked Reed why they wanted a union in the facility and if she thought they could work things out without a union. Messer also told Reed that she could see that their friendship was being torn apart over this. Messer testified that at a meeting of supervisors with Shuey he asked who was closest to Reed and Messer volunteered that she was. Shuey told Messer to go to Reed and tell her that their friendship would be threatened if the Union got in. Messer said that she did so in a conversation at which another aide was present. She also asked Reed what she would get if a union got in.

Virginia Messenger attended a meeting with Lyons, Wagner, and assistant director of nursing, Samra Mazzulli, on April 23 to discuss her return to work following an educational leave of absence. Messenger testified that during the course of the meeting Lyons asked Messenger if she had a tape recorder in her purse. She said no and offered to let Lyons inspect her purse. At one point, Lyons showed her ''a paper concerning charges of the Union'' and asked her if she was aware of them. When she said no, Lyons said that he wanted to make her quite aware of them. Lyons told Messenger that they would no longer work around her class schedule as had always been done previously, that he could not authorize her to return to either full- or part-time work, that it was not fair to the person who filled her position while she was on leave to take her out of that position and give it back to Messenger, and that the handbook did not require that she be given her job back upon return. When Messenger said that the handbook was never followed before, Lyons said from now on he was dotting his i's and crossing his t's and ''things would be followed.'' Lyons did testify about certain aspects of the meeting on April 23 but was not specifically asked about the statements described by Messenger. Wagner and Mazzulli denied seeing Lyons show charges by the Union to Messenger and did not recall him saying anything about dotting i's and crossing t's.

Uncontradicted evidence establishes that during the course of the Union's organizing drive on several occasions prounion employees passed out handbills at a location in front of the Respondent's facility known as ''the dip.'' It was a common practice for management personnel including Lyons, Wagner, Mazzulli, Messer, Lucy Mickelwicz, and Ray Sharp[3] to stand in the room of one of the nursing home residents, overlooking the dip, and view the activity going on there through the window. Jane Reed testified that she passed out handbills at the dip on four occasions, including once in late March. She saw Lyons observing her while walking outside the building and saw Wagner watching her from the window of the resident's room. She also saw Messer, Mazzulli, and Wagner drive by while she was handbilling. Virginia Messenger testified that she passed out handbills at the dip and saw Lyons observing her from the resident's room. She also saw Sharp, Messer, and Mickelwicz drive by while she was there. Messer testified that the Respondent's supervisors were directed by Shuey to observe employees' activities at the dip from the resident's room on a rotating basis between the hours of 2 and 3 p.m. and that they did so. Wagner also admitted observing activities at the dip from the resident's room.

Analysis and Conclusions

Susi was a credible and impressive witness while Malone was just the opposite. On direct, her testimony was unspecific and appeared rehearsed; on cross, she was argumentative and evasive.[4] Her insistence that when she passed

[3] In its answer the Respondent denied that Sharp was a supervisor within the meaning of Sec. 2(11) of the Act. The testimony of Lyons that Sharp was the housekeeping and laundry supervisor who had authority to hire and fire and who scheduled and directed eight or nine employees in his department establishes that Sharp possessed one or more of the criteria in Sec. 2(11). I find that Sharp was a statutory supervisor at all times material. *Gurabo Lace Mills*, 249 NLRB 658 (1980).

[4] The following excerpt from Malone's testimony is but one example of the difficulty encountered in trying to get a straightforward answer from her:

BY MS. BELFIGLIO:

Q. Now, it's true that you were instructed by Mr. Shuey to report to him employees that were pro-union?

A. I had no idea of knowing who was pro-union.

Q. But you were instructed to report to him employees who were pro-union if you were aware of that?

A. If I was aware, but I don't, no one actually ever said to me, except Raelynn, that she was pro-union.

JUDGE SCULLY: The question was what you were instructed by Mr. Shuey.

THE WITNESS: I think he was trying to gather, yes, the facts. Who was . . . .

BY MS. BELFIGLIO:

Q. The question was, did Mr. Shuey instruct you to report to him employees that were pro-union?

Continued

out the Respondent's literature to employees and discussed the Union with Susi and other employees she was not trying to convince them to vote against the Union, that she never urged them to vote against the Union and that she didn't recall that the literature she passed out asked the employees to vote against the Union, bordered on the ridiculous, as did her testimony that the Company didn't oppose the Union, but wanted the employees to have the facts on both sides so they could make an educated vote. Messer's credible testimony concerning Shuey's instructions to Malone and other supervisors to isolate Susi and break her down puts Susi's testimony about Malone's statements and actions in context and enhances its credibility. Her testimony also corroborates Susi's concerning the conversation with Malone that Messer witnessed. I find that Malone made the statements as described by Susi and Messer.

Contrary to the Respondent's contentions, the fact that neither Susi nor Reed curtailed their prounion activity following the threatening statements made to them by supervisors is not determinative. The Board uses an objective standard in evaluating such statements and the employees' subjective reactions are irrelevant. *Maremont Corp.*, 294 NLRB 11 (1989); *Emerson Electric Co.*, 247 NLRB 1365 (1980). Malone's statements to Susi that she had ruined her chances for a job in management by choosing to support the Union would reasonably tend to coerce and interfere with employee rights and violated Section 8(a)(1). *Fort Wayne Foundry Corp.*, 296 NLRB 127 (1989); *Southwire Co.*, 282 NLRB 916, 918 (1987). The same is true of Malone's statements that Susi would be unable to get a job elsewhere because the Respondent would inform prospective employees of her Union support. *EDP Medical Computer Systems*, 284 NLRB 1232, 1264 (1987). The Respondent also violated Section 8(a)(1) when Malone told Susi that she would ''lose out on a lot'' by supporting the Union and told her she could ''redeem'' herself and the Respondent would not hold her Union-support against her if she agreed to campaign against the Union. The former threatened loss of benefits because of her support for the Union and the latter implied she could avoid reprisals by renouncing that support. *Southwire Co.*, supra at 918.

On two different occasions when Malone gave her literature to read, she told Susi that if the Union got in a strike was ''inevitable,'' that she would be replaced because she could not cross the picket line, that all the Respondent had to do was put her on a preferential hiring list and that she would not get her job back because her replacement would not leave. The Respondent argues that there was no violation of Susi's rights because the literature contained a lawful statement concerning striking, replacement and reinstatement rights which Susi could have read. I do not agree. Malone was not content to let the literature speak but sought to embellish it with her own comments that a strike was inevitable, that Susi would have to participate in it and that she would lose her job. These statements violated Section 8(a)(1) because Malone made it clear that if the Union won the election there would be a strike. The Board found similar statements unlawful in *Devon Gables Nursing Home*, 237 NLRB 775, 776 (1978):

> The speakers stated flatly, without qualification, that, if the Union won, a strike would occur. The logical inference from these statements is that no matter how negotiations progressed and no matter what the Union sought from Respondent the employees would nevertheless have to strike to obtain a contract. It is clear that the statements about the inevitability of strike contained a threat that the Respondent would refuse to bargain in good faith in order to insure a strike.

Further, while playing lip-service to Susi's right to reemployment in the event of replacement during a strike, Malone told her that she would never get her job back.

Malone's comments to Susi paraphrasing the Respondent's literature concerning bargaining also violated the Act. By telling Susi that the Union could not do anything for the employees, that they would start from ''ground zero'' and that the Respondent would never give more to a union facility than a nonunion facility, Malone went beyond merely explaining the mechanics of bargaining and indicated that it was futile for the employees to choose the Union as their bargaining representative because they would end up no better off than without such representation, *E. I. du Pont & Co.*, 263 NLRB 159, 165 (1982); *Electric Hose Co.*, 262 NLRB 186, 214 (1982).

I find that the Respondent violated Section 8(a)(1) when it threatened to reduce Susi's hours. The timing of an employer's action can be persuasive evidence of its motivation. *Limestone Apparel Corp.*, 255 NLRB 722, 736 (1981). Susi had been working 40 hours per week for 2 years prior to the threatened cutback, which was announced only after Susi informed Malone of her intention to support the Union and was apparently a part of the Respondent's strategy to break her down. The Respondent offered no evidence to establish that the threatened cutback in activity hours had any purpose other than to attempt to deter Susi's support for the Union.

I find that the Respondent violated Section 8(a)(1) by coercing and interfering with employees' rights when Messer questioned Reed about what the Union could do for her, while at the same time threatening that Reed's support for the Union would ruin their friendship. Messer's testimony shows that this was not a spontaneous, casual conversation between friends or a naturally developing estrangement arising from the two women's opposing views about unionization, but was a deliberate ploy to undermine Reed's support for the Union conceived and orchestrated by Shuey.

As for the allegations concerning the meeting between Virginia Messenger and administrator Lyons on April 23, I accept the testimony of Messenger as to what occurred.[5] I found Messenger to be more credible than Wagner and Mazzulli. Lyons, whose actions and comments are in issue,

A. That would have been a matter of my opinion. I had no idea of what employees were pro-union.

Q. Did he tell you to report to him employees who were pro-union?

A. If I knew any that were, yes.

Q. Those were his instructions?

A. Yes.

[5] Messenger testified that Lyons showed her a paper concerning charges by the Union. In all likelihood the paper referred to the Union's election objections as the Unions's first charge was not filed and served until April 23. I do not find that this detracts from her credibility as she was apparently repeating Lyons' characterization of what the paper was.

did not specifically deny them. I find that Lyons made the comment about dotting i's and crossing t's and that, coupled with his comments to Messenger, that the Respondent would no longer work around her class schedule and would not authorize her to return to her former position because the handbook did not require it, amounted to an unlawful threat of stricter enforcement of its rules because of the employees' support for the Union. Any ambiguity in Lyons' remarks was removed on June 10 when he personally invoked a nonexistent rule in order to set Messenger up for discipline, as is discussed below. In addition to Lyons, Wagner and Mazzulli are alleged in the consolidated complaint to have made threats on April 23; however, none have been established. I shall recommend that these allegations be dismissed.

On several occasions employees who were handbilling at the dip in front of the facility were observed by supervisors from a resident's room and from cars as they drove by. In order to be unlawful, surveillance of employees' activities carried on in a public place must be shown to be something other than the result of ''fortuitous'' circumstances and to involve suspicious behavior or untoward conduct. *Hoyt Water Heater Co.*, 282 NLRB 1348, 1357 (1987); *Gossen Co.*, 254 NLRB 339, 353 (1981). I find that it has not been established that on those occasions when supervisors drove by employees who were handbilling at the dip at the time of a shift-change it was anything other than fortuitous and that it did not violate the Act. The same is true of Lyons' one-time observation while walking outside the building. This is not the case with the systematic observation of employee activity at the dip which necessitated invading the privacy of a resident's room in order to use it as an observation post. The evidence establishes that supervisors were assigned on a rotating basis to regularly observe the employees' activity at the dip at specific times and to report these observations to Shuey. The observers were visible to the employees at the dip and there is no evidence that anything improper or disruptive had occurred there which might, in appropriate circumstances, justify conducting surveillance. See *Halo Lighting*, 259 NLRB 702, 716 (1981). On the contrary, it appears that the sole reason for the continuous, systematic surveillance of employees' activity at the dip was to intimidate and coerce them and to provide the Respondent's labor consultant with information concerning who was involved in prounion activity. I find that the Respondent violated Section 8(a)(1) by engaging in this systematic surveillance. *Impact Industries*, 285 NLRB 5, 19–21 (1987).

3. No solicitation/distribution rules and related matters

During the Union's organizing campaign the following statement of policy was contained in the Respondent's employee handbook:

> No Solicitation
>
> Solicitation by an employee of other employees is prohibited while either person is on working time. Working time is all time when an employee's duties require that he or she be engaged in work tasks, but does not include meal periods, scheduled breaks, or time before or after a shift. In addition, solicitation is prohibited at all times in immediate patient care areas.

In addition, the following was contained in a booklet entitled ''HCR Rules For Your Protection'' applicable to the employees:

> TYPE B (SERIOUS)
>
> . . . .
>
> II. Soliciting or distributing written materials during working time or in any work area or resident care area is not permitted.

The rules booklet indicates that a type B offense is considered very serious and may result in discipline or discharge.

Alice Rogers, who is employed as a nursing aide, testified that on four or five occasions during the organizing campaign when she was speaking to other employees in the hallways of the facility, Dennis Lyons told them that he did not want any talk about the Union up and down the hallways. Nursing director Carol Wagner testified that during the campaign she talked to employees about the Union, giving them the Respondent's views, in hallways and at the nursing stations.

Nursing aide Jane Reed testified that on February 20 she was seated in the breakroom reading a prounion pamphlet during her morning break. Another employee was also present. Supervisor Robin Messer came into the breakroom and took the pamphlet away from Reed. Reed asked for the pamphlet back but Messer refused, said it was a ''company property'' and took it with her. When she left Messer also picked up and took away other union literature that was on a table. Nursing aide Debra Lyle testified that on February 21, while she and other employees were in the breakroom, Messer came in and removed three pieces of prounion literature that Lyle had placed on a table in the room. Raelynn Susi testified that in early April she observed Messer enter the breakroom and remove from the bulletin board a poster urging employees to vote for the Union. Lyle and Susi testified that it had been a common practice for employees to put information in the breakroom and to post information on the bulletin board located in the room without having to ask for permission.

Robin Messer's testimony confirmed that she had taken prounion leaflet from Jane Reed. When she did so Messer told Reed if she had any problems to go see the administrator. She also confirmed the testimony of Lyle and Susi concerning her removal of union literature from the breakroom on February 21 and in early April. Messer testified that she acted pursuant to the instructions of Shuey to the Respondent's supervisors to remove all union literature whenever they found it and to bring it to him at the administrator's office.

Analysis and Conclusions

Counsel for the General Counsel contends that the Respondent's rule prohibiting solicitation is overly broad and violates the Act. The Respondent argues that its limitation on solicitations meets the criteria established by the Board in *Our Way, Inc.*, 268 NLRB 394 (1983). Although the statement of policy in the employee handbook prohibits solicitations during working time and in immediate patient care areas, the rules booklet prohibits solicitations ''in any work area or resident care area.''

The Board has established a specific policy covering health care facilities. *Springfield Hospital*, 281 NLRB 643,

665 (1986). This policy requires that such an employer's ''ban on employee solicitation be limited to immediate patient care areas.'' *Eastern Maine Medical Center*, 253 NLRB 224, 226 (1980). The Respondent's rule is not so limited and is presumptively invalid. There has been no showing that union solicitation in working areas of the Respondent's facility which are not immediate patient care areas would either disrupt care or disturb residents. Accordingly, I find that the Respondent's no solicitation rule is overly broad and violates Section 8(a)(1). Ibid.

Alice Rogers' testimony concerning Lyons' prohibiting employees from discussing the Union in the hallways was credible and was uncontradicted. At the same time, Wagner's testimony established that supervisors were free to speak against the Union in the same areas of the Respondent's facility. The Respondent violated Section 8(a)(1) by applying its no-soliciting rule in a discriminatory manner whereby it prohibited prounion employees from discussing it in the hallway while permitting antiunion campaigning in the same areas. *Blue Bird Body Co.*, 251 NLRB 1481, 1485 (1980).

The Respondent also violated Section 8(a)(1) by removing union literature from the tables and bulletin board in the breakroom where employees had previously been allowed to post information without restrictions. *Jennings & Webb, Inc.*, 288 NLRB 682, 690–692 (1988); *Honeywell, Inc.*, 262 NLRB 1402 (1982).

4. Harassment of union supporters

Debra Lyle testified that before work on March 20 Carol Wagner came into the breakroom where several employees were present, handed Lyle a resident's chart and insisted that she read it. Wagner said that someone had started a rumor that there was scabies, a highly contagious condition, in the facility and that it was not true. Later in the day, Lyle was called into Lyons' office where Business Manager Sherry Shaw was also present. Lyons told Lyle that there was a rumor of scabies going around and that he had heard that she had started it. Lyle denied that she was responsible for the rumor. Lyons said that he was not going to put up with it and if Lyle didn't like it ''there was the door'' and she could ''hit it.''

Wagner testified that she had heard that Lyle was spreading the story that there was scabies in the facility which caused a panic. In order to alleviate this panic, she went to the breakroom to assure the staff that the resident in question ''did not have scabies, only a probable case.'' She showed the resident's chart to Lyle and asked her to read it, then showed it to another aide. Wagner informed the other employees of the need to keep the matter confidential.

Alice Rogers testified that she was present in the breakroom that morning when Wagner came in looking for Lyle. When Lyle arrived Wagner showed her a chart and asked her if it said ''scabies.'' Lyle said she did not say it and walked away. Wagner said she did not want people talking about it and left the room.

Lyle also testified that just after the election she was called to Lyons' office where Wagner and Mazzulli were also present. Lyons did most of the talking and accused Lyle of telling nursing aide Michelle Jako that if Jako did not vote for the Union Lyle was going to untie the restraints on one of Jako's patients so that the patient would fall and Jako would get fired. Lyle denied making any such threat to Jako and said that she had a witness to her conversation with Jako which occurred at Jako's home the night before the election. Lyons asked Lyle to write out her version of what had occurred with Jako. Lyle said she refused because she was on her own time and it did not happen as Lyons alleged. Lyons told her that he was going to stand for it, that he was going to have an investigation and that if she didn't like it, there was the door, hit it. He also told her that their conversation should go no further than the people who were present in his office.

Lyons did not testify concerning this incident. Wagner testified that she spoke to Lyle about making a threat ''to set someone up.'' According to Wagner, she took this to mean that Jako was going to be set up by loosening the restraints on a patient.

Raelynn Susi credibly testified that about a week and a half before the election, her supervisor, Sandra Malone, told her that she had to come into work on her day off because she had received three accusations the previous day that Susi had been harassing employees on company time about the Union. Susi denied the accusations and Malone said she had no reason to disbelieve the people who told her. Later in the day, Susi was called into Lyons' office where Malone was also present. Lyons told Susi that he had heard that she had called some of their employees ''liars.'' Susi responded that she couldn't call someone a liar when she didn't know who had made the accusations or what they involved. Lyons asked if she had used the word ''liar'' and when Susi said she had, he said that he ''would not have it,'' that there was enough hard feeling going on over the union matter and if she wanted to put her accusations in writing he had lawyers who would handle it. Lyons also told her if she ''didn't like it, there was the door and the sidewalk continued on.''

Susi credibly testified that on another occasion when a rumor about scabies was going around she was called into Lyons' office. Lyons mentioned the scabies rumor and said he wasn't going to have it, that he did not want to look bad to the surveyors and again said if she didn't like it there was the door and the sidewalk. Lyons did not testify about either of these incidents involving Susi.

Jane Reed testified that during the 4 years of her employment by the Respondent she had participated in several April Fools' Day pranks, which were a common practice among the employees, without being spoken to or disciplined prior to 1990. On April Fools' Day in 1990, Reed and two other employees, Alice Rogers and Jo Rae Blanchard, participated in a prank in which Reed and Blanchard called in to a nursing supervisor pretending to be afternoon shift employees who would not be coming to work that day. Rogers, who was at the nurse's station where the calls were taken, yelled ''April Fool'' after the second call as Reed and Blanchard came up the hall. The supervisor, Betty Lou Roth, laughed about the prank with them and told them that she recognized Reed's voice and knew it was not Joanne Luedy, the aide whom Reed had impersonated. On April 7, prior to the end of her shift, Reed was called into Wagner's office where Mazzulli was also present. Wagner told Reed that Luedy was upset about the prank and had gone to the administrator to complain about it. She asked Reed to describe exactly what had happened step by step. To Reed's knowledge neither Blanchard nor Rogers was questioned about the incident. Reed also testified that on the day of the prank she had told

Luedy what she had done and Luedy had laughed and said if she had known she wouldn't have came in to work. Wagner testified that she learned of the incident on April 2, when Luedy and Supervisor Hazel Lodmell told her about it. She said the employees who were called off were very upset about the prank and that she had counseled Reed that it had caused a lot of hard feelings and unrest and cautioned her not to do it again, but that Reed was not given any form of discipline for the incident.

Analysis and Conclusions

Each of the employees involved in these incidents was an open and avowed union supporter whose views were known to the Respondent's supervisors. While the incident in which Wagner confronted Lyle concerning a scabies rumor, taken alone, might appear to be simply an attempt by Wagner to allay the fears of Lyle and other employees concerning the possible presence of scabies in the facility, the second confrontation involving Lyons makes it clear Lyle was being accused of spreading the rumor. The Respondent offered no evidence to support this accusation beyond the testimony of Wagner, whom, as I have already indicated, I found to be a less than credible witness, that she had ''heard'' that Lyle was spreading the scabies story. I find that by singling out Lyle as the source of the scabies rumor and by suggesting that if she did not like it she should leave the Respondent's employ was intended to harass her because of her union support and violated Section 8(a)(1). The Board considers statements which imply that a union supporter is unhappy on the job and should seek work elsewhere to be threatening and coercive. *Intertherm, Inc.*, 235 NLRB 22 (1978). This is also the case with the Respondent's accusing Lyle of threatening to ''set up'' Michelle Jako by loosening the restraints on a patient for whom Jako was responsible. There is no evidence whatsoever that Lyle made such a threat to Jako or even mentioned the possibility of restraints being loosened. The testimony of Lyle and Jako was that Lyle did mention the possibility of Jako being ''set up,'' but that she did not say how or by whom this might be done. Jako's testimony concerning being set up is equally susceptible to the interpretation that she was being warned by Lyle that she could be set up by antiunion advocates as it is to the interpretation that she was being threatened that prounion advocates would do so.[6] Despite the ambiguity of Lyle's comments to Jako, the Respondent interpreted them as a threat that Lyle would set up Jako and, in an apparent attempt to remove the ambiguity and make the alleged threat more credible, conjured up that it involved loosening the restraints on a resident so that he or she would fall and be injured. The Respondent through Lyons and Wagner, confronted Lyle with its version of her alleged threat to Jako, told her that it was going to have an investigation and that if she didn't like it she could hit the door. Again, I find the Respondent's actions, accusing Lyle of a serious offense, an accusation which had little, if any, validity and suggesting that if she didn't like it she leave its employ were threatening and coercive and meant to harass her for her union support in violation of Section 8(a)(1).

As discussed above, during the Union's organizing campaign Raelynn Susi had been targeted by Shuey to be ''broken down'' because of her support for the Union. It appears that as a part of this strategy Malone confronted Susi with allegations from unnamed employees that she had been soliciting for the Union during working time. When, according to Susi's uncontradicted testimony, she denied the allegations she was called before Lyons, who further accused her of calling his employees ''liars,'' threatened her with a lawsuit and suggested that she consider leaving the Respondent's employ. Lyons made a similar comment when talking to Susi about the scabies rumor. The Respondent offered no explanation as to why Lyons confronted Susi about the scabies rumor. I find both incidents involved coercive attempts by the Respondent to harass Susi because of her open support for the Union and violated Section 8(a)(1).[7]

I believed Jane Reed's testimony concerning the April Fools' Day prank. The only contrary evidence was the testimony of Wagner, whom I do not credit. Neither Joanne Luedy who Wagner claimed was upset by the prank nor Hazel Lodmell the supervisor to whom Luedy had allegedly first complained was called as a witness. According to the credible testimony of Reed, she had told Luedy about the prank and Luedy had laughed about it. Wagner offered no explanation as to why it took 5 days after she learned of the prank to speak to Reed about it if it had caused the ''hard feeling'' and ''unrest'' she described. She also did not explain why only Reed was ''counseled'' about the incident when two other employees were equally involved in it. When the reason given for the Respondent's action is false, another reason may be inferred from the facts in the record as a whole. *Shattuck Denn Mining Corp. v. NLRB*, 363 F.2d 466, 470 (9th Cir. 1966). I find that the facts indicate that Wagner seized upon Reed's involvement in a harmless prank, of a type that had been engaged in by employees during previous years without action by the Respondent, in order to harass a known union supporter in violation of Section 8(a)(1).

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[6] Jako's pertinent testimony was:

By Mr. Bixler:

Q. Did Ms. Lyle say anything to you about what could happen to you if you didn't support the union?

A. Yes, she said that there was a possibility that I could be set up.

Q. Okay, and did she say what she meant by that?

A. No, she just said there was a possibility that I could be set up. She didn't say that she would do it, or who would do. She just said there was a possibility.

By Mr. Reehl:

Q. Ms. Jako, you did not understand what they were talking about with regard to a set-up, I take it. Is that accurate?

A. Not quite. I mean, I know that she threatened me. I know that. I mean, I definitely know that she threatened that I could be set up.

Q. She threatened you?

A. Well, she didn't say she was going to do it, but she said it.

Q. That it could happen?

A. Yes.

Q. Did she indicate that maybe it could be by the company?

A. I don't know. She just said that I could be set up. That's what I'm saying. She didn't say that she would do it, or who would do it. She didn't mention any names.

[7] Counsel for the General Counsel contends that in both of these incidents Susi was issued a verbal warning which also violated Sec. 8(a)(3). The evidence does not establish that Susi received a verbal warning that was part of the Respondent's disciplinary procedure in either case.

C. *Alleged Violations of Section 8(a)(3)*

1. Jane Reed and Raelynn Susi

Jane Reed was an active union supporter from the start of the organizing campaign. She had advised Supervisor Robin Messer of her prounion position in mid-February. It was the practice at the facility that if a resident did not want the food offered to them at a meal they were offered a substitute. Nursing aides such as Reed would go to the kitchen, knock on the door, enter, and get what they needed. Reed testified that near the end of February she was working in the dining room and had to get a carton of milk for a resident. She went to the kitchen, knocked and entered and asked a worker for the milk. At that point, Robin Messer came up to her and yelled at her to get out of the kitchen. Messer said that Reed was not allowed in there anymore and thereafter she should knock at the door and stand outside and wait for what she needed. After this incident, Reed mentioned the occurrence to two other aides, Candy Frye and Diana Hayes, and asked them to go into the kitchen and see what happened. Both aides went into the kitchen and got what they needed without incident. Robin Messer testified that during a management meeting with Shuey, he told her to keep nondietary employees who were prounion out of the kitchen to prevent them from campaigning there. In accordance with Shuey's instructions, she ordered Reed to stay out of the kitchen during late February. On the same day, she allowed Frye and Hayes to enter the kitchen because she did not know what their sentiments were about the Union.

Jane Reed testified that April 12, the day of the election, she was not originally scheduled to work. However, she was called to come in to work a 2-hour shift from 6 to 8 a.m. that day, something she had never done before. Reed and Eva Neff were assigned to give showers that morning. Although their usual practice was to work together giving the showers because of the danger a resident might fall, Supervisor Lucy Mickelwicz, in the presence of Mazzulli, told them to work separately and that if they needed help to call her. Mickelwicz also pulled a chair out into the hall where Reed and Neff were working and sat there observing them, something that she did not normally do. Reed said that Mazzulli and Supervisor Ray Sharp were also present in the area observing them that morning. Although Reed would not normally have been given a break while working a 2-hour shift, at 7 a.m., Mickelwicz told Reed and Neff to leave the floor and to take a 15-minute break. The normal breaks for the day-shift aides did not begin until 8:15 a.m.

Reed testified that around April 20,[8] at the end of her shift, she was given a writeup ''for too many call offs'' by Samra Mazzulli, who told her she was allowed 6 days in a year and Reed had taken 9 and was being given a verbal warning. Reed objected that some of the days Mazzulli had included were days she had been off as the result of an injury at work. Mazzulli said she would check on it and get back to her on the following day. The next day Mazzulli tore up the warning because it did include days when Reed was off due to a work-related injury. However, as Reed began to leave the room, Mazzulli called her back and gave a second writeup based on days other than those she missed because of the injury.

Robin Messer, the former supervisor of the dietary department, testified that the policy calling for warnings for excessive absences was not regularly enforced prior to the Union's organizing campaign. However, after the campaign, Messer was told by Dennis Lyons to pull out the attendance records of known prounion employees. She was to check those records to see if any of the prounion employees ''were in any kind of writeup situations.''

Samra Mazzulli testified that the absence policy calls for a verbal warning for more than two absences within 60 days or more than six within a 12-month period. She said that enforcement of this policy was not one of her priorities, but that she had time available after the election in April to attend to absenteeism problems. She said that she issued several similar warnings at that time and that their proximity to the election was coincidental. She testified that Lyons did not tell her to go through the attendance records and write up those who were in violation of the policy.

Raelynn Susi testified that immediately after she informed her Supervisor Sandra Malone of her support for the Union, Malone changed Susi's work schedule. Susi had previously alternated between a day-shift from 8 a.m. to 4:30 p.m. and an afternoon shift from 11 a.m. to 7 p.m. She began being scheduled to begin working later and to be required to stay later in the evening, sometimes until 8:30 p.m., even though there were no activities to be conducted later than 7 p.m. When Susi asked about the change, Malone told her that one of the reasons was that because Malone had to be out campaigning on behalf of the employer and could only do so on company time, Susi would have to do some of the activities documentation that had previously been Malone's responsibility but which she no longer had time for. Susi also testified that as a result of Malone's need to be out campaigning against the Union, Susi had to run three-fourths of the activities and had to work 2 or 3 hours of unpaid overtime in order to get Malone's documentation caught up.

Susi testified that shortly after deciding to support the Union in late February she asked Malone to give her a schedule indicating when she was to take her lunch and break periods because she was going to be working on a weekend when Malone would not be present. Malone responded that Susi had never had scheduled breaks before, that she was a responsible person who knew when the activities were going on, and that it was not necessary for her breaks to be scheduled. Near the end of March, Malone informed Susi that after discussions with Lyons they had decided that Susi should have her lunch and break periods at specific times. From that point on, the times of her breaks were designated by Malone and her lunch periods were scheduled for times when no other employees were taking lunch.

Robin Messer testified that during March one of her dietary employees complained to her that she had been telephoned by Susi to campaign for the Union at 8 or 8:30 the previous night. Messer informed Malone of the complaint and Malone said that Susi had been working at the time of the call. Together they reported the matter to Shuey who said Susi could not campaign on company time and proposed that the telephone be removed from the activities office. Messer was present in the activities office on March 22 when Lyons

[8] The warning form indicates these incidents occurred on April 18 and 19. The discrepancy is not significant.

called Malone on the telephone and said that he could not hear her and that there was something wrong with the telephone. The telephone was removed from the office and was not returned until immediately following the election when Lyons brought the telephone into the office and said it had been fixed. Messer testified she had used the same telephone a few minutes before Lyons' call to Malone and there was nothing wrong with it.

Raelynn Susi testified that the day following the election she was summoned to Lyons office where Malone was also present.[9] Lyons accused Susi of making a telephone call to an unidentified employee to campaign for the Union around 8:15 or 8:30 the night before the election while she was at work. Susi told them that she had not made any calls from work, but that she had made several calls immediately after arriving at her house that night. Lyons response was to ask Susi why the person who was called would lie about it. Susi again denied making the call. Lyons told her that an investigation was going on, that she should consider herself ''seriously talked to'' and that formal discipline would follow.

Analysis and Conclusions

The credible and uncontradicted testimony of Reed and Messer establishes that the Respondent discriminated against Reed by denying her access to the kitchen while other employees not known to support the Union were allowed to enter. Although Reed identified Frye and Hayes as prounion, Messer credibly testified that she did not know what their sentiments were and that was the reason they were allowed to enter the kitchen while Reed was not. The Respondent offered no justification for changing its practice and excluding Reed from the kitchen while she was engaged in performing her usual duties and the testimony of Messer makes it clear the Respondent's motivation for doing so was to retaliate against Reed because of her support for the Union and prevent her from having contact with dietary employees she might talk to about the Union. The Respondent violated Section 8(a)(3) of the Act by discriminatorily prohibiting Reed from entering the kitchen. *Animal Humane Society*, 287 NLRB 50, 59 (1987).

Counsel for the General Counsel contends that the Respondent called Reed into work for 2 hours on the day of the election, required her to work alone doing a task that two aides usually did together, kept her under close observation by supervisors, ordered her to leave the floor for an unscheduled break at the time the day-shift aides were coming onto the floor to start their shifts and ended her shift before the other aides started taking their normally scheduled breaks in order to isolate Reed, a known prounion activist, and to prevent her from contact with other employees on the day of the election. The Respondent contends that there is no evidence linking its treatment of Reed that morning to her union support.

The credible and uncontradicted testimony of Reed establishes that her treatment on the morning of the election was highly unusual and deviated from normal practice in each of the respects cited by the General Counsel. The evidence is clear that Reed's prounion sentiments were known to the Respondent and she had been subjected to other incidents of unlawful harassment and discriminatory treatment because of her union support. The Respondent offered no explanation for its unusual treatment of Reed on April 12. The fact that all this occurred on the morning of the election cannot be ignored. In the absence of any reasonable explanation for its actions, I infer that the Respondent brought Reed into work for a limited time on the morning of the election in order to be able to monitor and restrict her whereabouts and movements that morning and to limit her opportunities to have contact with other employees who would be voting in the election that day. I find that the Respondent violated Section 8(a)(3) by its imposition of discriminatory working conditions on Reed on the day of the election because of her support for the Union.[10] *St. Agnes Medical Center*, 287 NLRB 242, 254 (1987); *EDP Medical Computer Systems*, supra at 1295–1296.

Although Reed said she did not agree with the dates listed on the warning she received for excessive absences, there is no specific evidence casting doubt on the correctness of these dates. Consequently, it appears that Reed was in violation of the Respondent's policy and subject to receiving a verbal warning. Under these circumstances, where the lawfulness of issuing the warning to Reed depends upon the Respondent's motivation in doing so, the Board requires an analysis pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the Respondent's decision to issue this warning to Reed. Once this has been done, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of protected activity on Reed's part.

There is ample evidence of Reed's open involvement in the Union's organizing campaign, the Respondent's knowledge of her prounion sentiments and activities and that she had been subjected to other acts of harassment and discrimination by the Respondent because of her support for the Union. There is also ample evidence of union animus on the part of the Respondent given its opposition to the Union's organizing campaign and the numerous violations of Section 8(a)(1) and (3) of the Act discussed herein. There is also Messer's credible and uncontradicted testimony that Administrator Lyons directed her to look through the attendance records of the employees she supervised and to single out prounion employees for disciplinary action for violations of the attendance policy. I find that the General Counsel has established a prima facie case that the warning given to Reed was motivated by antiunion considerations.

Mazzulli's testimony and the documentary evidence presented by the Respondent establishes that she issued similar warnings to other employees under her supervision at about the same time this warning was issued to Reed, including one to employee Delores Persiani, who had served as the Company's observer at the election. While it is a close ques-

[9] The complaint alleges that this incident occurred on or about April 16 while the evidence establishes that it was on April 13. This difference is not significant and I find that the Respondent could not have been misled by it.

[10] I do not find that the Respondent's actions with respect to Reed on the day of the election constitute separate and independent acts of unlawful surveillance and harassment.

tion, I find the Respondent has not established that it would have taken the same action absent the protected activity on the part of its employees. The timing of an employer's action can be persuasive evidence of its motivation. *Limestone Apparel Corp.*, supra at 736. I find that to be the decisive factor here. In Reed's case, according to the information on the warning form, she had been in violation of the absenteeism policy on a regular and continuing basis since as early as October 19, 1989, yet no action was taken until shortly after the election. In the case of Persiani, who presumably was not a union supporter, although she was in rather flagrant violation of the policy with more than two absences in 60 days as of May 22, 1989, and with more than six absences in 12 months as of July 18, 1989, her warning was not issued until April 30, 1990, a matter of days after the filing and service of the Union's first charge in this matter, which alleged, inter alia, that the issuance of certain verbal warnings to employees violated the Act. I infer that Persiani was given the warning at that time in order to mask its unlawful actions against Reed. While Mazzulli seemed to imply that the Union's organizing campaign kept her so busy that she couldn't catch up with attendance problems until after the election, both Reed and Persiani were subject to receiving warnings long before the organizing campaign even began. I find that the Respondent violated Section 8(a)(3) of the Act by issuing a verbal warning to Jane Reed on April 19.

Counsel for the General Counsel contends that the Respondent discriminated against Raelynn Susi by changing her work schedule, requiring her to work unpaid overtime, requiring her to take her lunch and breaks at times it designated, by removing the telephone from the activities office and by giving her an unwarranted verbal warning, all because of her activities in support of the Union. The Respondent contends that Susi's schedule did not change, that her lunch and break periods were scheduled by Malone at Susi's request, that she worked only a minimal amount of unpaid overtime, and that the verbal warning Susi allegedly received was not documented and did not constitute a form of discipline.

Susi was an open and acknowledged union supporter and the Respondent was aware of her sentiments. I find the General Counsel has established a prima facie case under *Wright Line*, supra, with respect to each of the incidents involving Susi except changing her work schedule. The evidence the Respondent offered, consisting of Susi's work schedules before, during, and after the Unions's organizing drive, confirms Susi's testimony that her schedule was changed to include more later starting and ending work tours than she had before she informed Malone of her support for the Union and contradicts Malone's testimony to the contrary. However, I find there is insufficient evidence to establish that this change in Susi's working hours was in and of itself discriminatory. It is possible that it was done as a part of what I have found was a plan or strategy on the Respondent's part to isolate Susi and break her down, by requiring her to be at work when there would be fewer employees present to influence in favor of the Union, but that is too speculative to warrant finding a violation. However, that is not the case with respect to the change in her working conditions resulting from her being required to work overtime in order to do some of Malone's work or her being required to take her lunch and break periods at times designated by Malone.

Susi's credible and uncontradicted testimony was that she was given extra work to do by Malone involving the documentation of activities that had previously been Malone's responsibility to perform. To add insult to injury, Malone informed Susi that she was being given the extra work because Malone had to spend her time campaigning against the Union and she could only do it on company time. The Respondent argues that Susi never turned in a request for overtime pay. While her testimony indicates that may have been true, it also indicates that overtime pay had to be approved by her supervisor, Malone, who did not authorize it. Whether it was turned in or not is beside the point, the fact is that Susi's working conditions were adversely impacted by being required to do what had been her supervisor's work so that the supervisor could campaign against the Union. This was coercive and interfered with Susi's rights as an employee and resulted directly from the Respondent's opposition to the Union's organizing campaign. I find that the Respondent violated Section 8(a)(3) by requiring Susi to perform additional work during the period of the Union's campaign.

Malone's testimony that Susi requested that Malone designate the times for her lunch and break periods amounts to a cynical distortion of the truth. Susi's credible testimony establishes that shortly after she informed Malone of her support for the Union, she requested that Malone designate specific times for her lunches and breaks on one weekend during which she would be working and Malone would not. In all likelihood, Susi was seeking to protect herself from the kind of harassment and coercion the Respondent would subject her to later on. Notwithstanding Susi's request, Malone declined, telling Susi that her responsible conduct in scheduling her own breaks during the past 2 years made it unnecessary. Nearly a month later, after consultation with Lyons, Malone imposed a schedule of lunch and break periods on Susi, which significantly limited her nonworking time contact with other employees by requiring her to take most of her breaks when no other employees were doing so. The Respondent offered no reason for imposing the scheduled breaks on Susi apart from Malone's testimony that it was done at Susi's request, which I find is a pretext. Given the evidence that Susi had been targeted by the Respondent to be isolated and broken down because of her support for the Union, I find that this scheduling was done in furtherance of that effort and violated Section 8(a)(3) of the Act.

I find that the removal of the telephone from the activities office did not violate the Act notwithstanding the suspicions generated by the Respondent's conduct in pretending the telephone was defective and needed to be removed in order to be repaired. The limited evidence concerning this matter in the record indicates that the Respondent had reason to believe that Susi had made a call campaigning for the Union from the telephone in the activities office during working time and that it removed the telephone in order to prevent her from doing so. While it may have used a more straightforward approach to accomplish a lawful objective, the evidence fails to establish that removal of the telephone was discriminatory or that it violated Section 8(a)(3) of the Act.

Unlike the matter leading to the removal of the telephone which resulted from a credible report from an identified employee that Susi had called her about the Union while on working time, there is no evidence in the record to support the Respondent's accusations that Susi had made such calls

during working time on the night before the election. Susi credibly denied making the alleged calls while at work, but said she did make some calls immediately after arriving home. It is noteworthy that on the day Susi was accused of having made the calls, the telephone which had been removed from the activities office had not been returned. Neither Lyons nor Malone testified about this incident. The Respondent apparently does not deny it, but argues that since there is no documentation evidencing the fact that Susi had received a warning, it did not amount to disciplinary action against her. Susi credibly testified that Lyons, the principal management official at the facility, told her that she should consider herself ''seriously talked to'' and that ''formal discipline'' would follow. Under the circumstances, I find that Susi was subjected to a verbal warning notwithstanding the Respondent's failure to document it in writing. Is is clear that Susi considered it to be disciplinary action against her. Inasmuch as there is no evidence in the record to support a finding that Susi made the alleged telephone calls while at work and Susi credibly denied doing so, I find this warning was based on a pretextual allegation of misconduct and violated Section 8(a)(3) and of the Act.

2. Virginia Messenger

As noted above, after being interrogated by Wagner concerning the Union's organizing campaign in early February, Virginia Messenger got actively involved, soliciting union authorization cards, handbilling at the dip, passing out prounion literature, including a letter to employees describing her experience at another of the Respondent's facilities, and serving as the Union's election observer. Messenger had also been active in a previous union campaign at the Lansing facility. She had been enrolled in a part-time college program in respiratory therapy while working for the Respondent. She worked on the day shift and her schedule was set up so that she had 2 days off during the week to go to school. Since October 1989, she had a part-time job related to her respiratory therapy program at a nearby hospital which she worked on her weekends off from Lansing. Messenger credibly testified that Wagner was aware of her school program and hospital job. Each semester she submitted her class schedule and Wagner arranged Messenger's work schedule to accommodate it. She had also informed Wagner when she got the job at the hospital on her off weekends. Wagner told Messenger she was happy for her and had given the hospital a good reference for her.

In January, because of her heavy course schedule, Messenger sought an educational leave of absence from Lansing. She asked Wagner about it and was told to go to the administrator. Messenger spoke to Acting Administrator Lucy Rodenhauser and Regional Manager Eleanor Alvarez and submitted a written request for a 3-month leave of absence, which was approved. Messenger testified that Alvarez told her she saw no problem with Messenger returning to her day-shift position, but that she would have to work it out with Wagner and Mazzulli. Messenger began her leave of absence on February 12. On April 13, the day following the representation election, she was telephoned by Mazzulli who asked if she would be returning to her job in May. Messenger said that she would and Mazzulli said she would be working the day shift as she had before. Sometime later, Messenger telephoned Wagner and asked if she was on the schedule in May. Wagner said that she was not and a meeting was set up for April 23. At the meeting, which Wagner, Mazzulli, and Lyons attended, Messenger was told that she had not been put on the schedule because she had not submitted a written request to return to work. Lyons said that he could not authorize her either full- or part-time, that it would not be fair to her replacement to take her out of the position and give it to Messenger and that the handbook did not require it. When Messenger said if he could not authorize her for a full- or part-time position she would have to resign, Lyons told her to put it in writing. Messenger said that she did not want to quit and was told that they would put her wherever they could. On May 1, she submitted a written request to return to work 2 weeks from that date. After Wagner and Mazzulli told her they could not give her full-time work they required her to put in writing that she would accept part-time, which she did on May 14. Messenger was put on the schedule to work from 11 p.m. to 7 a.m. although she had told Mazzulli, who makes out the schedules, that she could not work that shift because of school. Mazzulli told her to work out a trade with someone on another shift. Messenger also mentioned to Mazzulli that she was working every other weekend at the hospital. Messenger said she was scheduled for an average of 14.5 hours per week compared to 37.5 she had worked prior to her leave of absence, mainly on afternoon and midnight shifts.

Messenger testified that on the weekend of June 9 and 10, she was scheduled to work at Lansing on what normally would have been her weekend off. This happened because on the previous weekend she had taken 1 day off due to illness and it was the practice at Lansing that if you took off one of the days of a weekend, you were scheduled to work the following weekend. As a result, Messenger was scheduled to work from 7 a.m. to 3 p.m. at Lansing and 3 to 11 p.m. at the hospital on both days. Although she attempted to trade shifts at Lansing those days, she was unable to do so. On Saturday morning, Messenger spoke to Nursing Supervisor Jackie Briggs and told her about the conflict in jobs, that Wagner was aware of her other job, and asked if she could leave at 2:30 p.m. if she had all of her work done. Briggs said it was okay with her but that she would have to call Wagner. Messenger testified that in her experience the practice was that if someone had a legitimate reason for leaving early and all her work was done, the nursing supervisor would authorize it and that she had done so herself on at least one other occasion. On June 9, she had all of her work done and left at 2:30 with Briggs' permission.

On Sunday June 10, Messenger spoke to Nursing Supervisor Beverly Tisko, told her of her need to leave early to work at the hospital and that she had been allowed to do so the previous day. Tisko gave her permission to leave early. At 2 p.m. Lyons came to Tisko's station while Messenger was nearby and asked if she was fully staffed. Tisko said yes, but that Messenger was leaving at 2:30. Lyons asked her if Messenger had written permission from Wagner to leave early. Tisko said she did not know and asked Messenger, who said she did not and did not know it was necessary. When Tisko told Lyons she did not have it, he said that Messenger could not leave early without a note from Wagner. Tisko told Messenger what Lyons had said and that she had to follow what he told her. Messenger asked Tisko what would happen if she left and Tisko said she would probably

be written up. Messenger told her she was going to leave and did so at 2:37 p.m.

On Tuesday, June 12, Wagner called Messenger at home and told her they needed to talk about what had happened on the weekend and scheduled a meeting for that morning. Messenger met with Wagner, Mazzulli, and Lyons. Wagner asked her what had happened and Messenger said that she had permission to leave until Lyons got there. Wagner told her that the three of them had thought it over and had decided to terminate her. Messenger asked why the punishment was so severe and was told it was because she had walked off the job and was insubordinate. Lyons handed her a termination notice.

Samra Mazzulli testified that the meeting on April 23 was held to discuss Messenger's return from her leave of absence and when she was available to work. Messenger did not have her schedule for the next semester and was unable to say when she would be available. Messenger was told that she could come back on full-time status but that it could not be on the day shift as her position there had been filled and that she would have to be available at the Respondent's convenience. According to Mazzulli, Messenger responded that she couldn't work days because she would have to leave for school too early, she couldn't work afternoons because she would come in too late and couldn't work midnights either. Messenger was to get back to her with her school schedule within the next few days but did not do so. Mazzulli then sent her a letter telling her she was not on the current schedule which ran until May 24 and asking her to give 2 weeks' notice of the date she would be returning to work. Messenger was on the schedule beginning on May 25 and was scheduled for seven shifts during the 2-week period. Messenger actually returned to work on May 17 as a substitute for another aide and also substituted on May 19 and 20. On the 3 following days, May 21 through 23, Messenger declined requests that she substitute for someone.

Carol Wagner testified that prior to Messenger's leaving on her leave of absence she had worked 37-1/2 hours a week on the day shift. Each semester Messenger brought in her school schedule and Wagner worked out a schedule which accommodated the class schedule and allowed her to work full time. Wagner never scheduled Messenger to work when she knew it would conflict with her class schedule. Wagner did not have to make any accommodations for Messenger's weekend job at the hospital as it was routine for her to have every other weekend off and Messenger scheduled her hospital job so that it did not conflict with her job at Lansing. According to Wagner, when Messenger came in on April 23 she brought her then-current school schedule and she could not work days because it conflicted with her classes and she couldn't work afternoons because she couldn't get there at 3 p.m., so it was not possible to give her 37-1/2 hours.

Wagner testified that she was informed by Tisko that Messenger had left her shift early on the night it happened. She discussed the matter with Mazzulli, Lyons, and Alvarez. She and Lyons made the decision ''that to be fair and consistent'' Messenger should be terminated. This decision was made before she heard from Messenger, but she had the opportunity to give her input during the meeting at which she was terminated.

Beverly Tisko testified that she was first approached by Messenger about leaving early on the morning of Saturday, June 9. Messenger told her about her hospital job and said it was ''okay through the office.'' Tisko referred her to Briggs who was the supervisor in the area Messenger was working that day. On Sunday, when Messenger was working under her, she reminded Tisko that she would be leaving early and said ''the office was aware of it.'' Tisko said okay and to check with her before she left. When Lyons came into the facility and asked about staffing, she told him that Messenger was leaving early. Lyons asked if Messenger had approval from Wagner or Mazzulli and Tisko told him Messenger said ''the office had given her approval.'' Lyons told her if Messenger did not have written approval from Wagner or Mazzulli she could not leave and she so informed Messenger.

Analysis and Conclusions

The General Counsel contends that the Respondent violated Section 8(a)(3) of the Act by discriminatorily delaying Messenger's return from her leave of absence, by reducing the hours she was scheduled to work upon return and by terminating her. The Respondent contends that any delay in Messenger's return was caused by her failure to advise it when she was available to work, that her failure to get more hours on her return was the result of her inability to work the shifts that were available for her and that she was terminated for cause.

I find that the General Counsel has made out a prima facie case under *Wright Line* sufficient to support the inference that the adverse actions taken against Messenger were motivated by antiunion considerations. There is ample evidence that the Respondent was aware that Messenger was active in the Union's organizing campaign, even though much of it was conducted while she was on her educational leave of absence, as well as in a previous organizing campaign by another union. There is also substantial evidence of union animus on the Respondent's part, including its opposition to the Union's campaign and the numerous other violations of Section 8(a)(1) and (3) found herein.

The Respondent's policy on leaves of absence provided no guarantee that Messenger could return to her same shift or even that a job would be available. I find that Alvarez's comment that she saw ''no problem'' with Messenger's returning to the day shift did not amount to a guarantee that her day-shift position would be available. However, Messenger credibly testified that on April 13 Mazzulli contacted her by telephone, asked if she would be returning at the end of her scheduled leave of absence, May 12, and when Messenger said she would, told her she would be returning to the day shift. Mazzulli did not deny making this telephone call or telling Messenger she would return to the day shift. The evidence establishes that prior to her leave of absence the Respondent had always accommodated Messenger's class schedule by scheduling her work shifts so that they did not conflict. Notwithstanding Mazzulli's call and assurance to Messenger that she would return to her old shift, by the time of the April 23 meeting, the Respondent's position had changed. At this meeting, ostensibly arranged to set up Messenger's return to work, she was accosted by Lyons who asked her if she was aware of the Union's charges against the Respondent and if she had a tape recorder in her purse. Lyons also told Messenger he could not authorize either a full- or part-time position for her and that the Respondent

would no longer work around her school schedule. It was at this meeting that Lyons made his comment about dotting i's and crossing t's and Messenger was informed that she had to give 2 weeks' notice in writing that she wanted her job back. The Respondent's policy concerning returning to work after a leave of absence does require 2 weeks' notice, but does not require that it be in writing or specify how it is to be given. Messenger had given Mazzulli the required notice in their telephone conversation on April 13. The Respondent's refusal to accept that and its insistence on a written notice even after the April 23 meeting indicates to me that it was attempting to harass her and impede her return to work. The Respondent makes much of the fact that Messenger did not have her school schedule for the upcoming semester at the April 23 meeting or provide it thereafter. This appears to be nothing but a smokescreen and a further attempt to put the burden on Messenger for its failure to schedule her for work after May 12. At the time of the meeting, Messenger was attending classes and obviously aware of the schedule that she was already following. Wagner's testimony admitted that Messenger had her then-current schedule with her at the meeting and that it was the basis for Messenger's being unable to work certain shifts and the reason why, in Wagner's words, ''we didn't have 37 1/2 hours to give her.'' It appears that the only reason Messenger could not be given 37-1/2 hours was that the Respondent had decided that it would not work around her schedule as it had always done before, but she would have to work around the Respondent's, something that was impractical if not impossible given that she was already enrolled in classes. The Respondent offered no reason for this change in its practice and considering the evidence as a whole, I infer that it was because of the Union's organizing campaign and Messenger's activities in support of it. Nor was there any evidence, beyond the management representatives' self-serving assertions to Messenger, that her position on the day shift was not available. It was apparently available on April 13 when Messenger spoke with Mazzulli about it.

I find that the Respondent has not established that it would have taken the same action in the absence of protected activity on Messenger's part. I find that its failure to put Messenger back on the day shift as of May 13 and to accommodate her class schedule in the same manner it had previously done and its failure thereafter to schedule her for 37-1/2 hours per week was motivated by its desire to retaliate against her for engaging in protected activity and violated Section 8(a)(3) of the Act.

For the reasons stated above, I find that the General Counsel has made a prima facie case that Messenger's termination was motivated by antiunion considerations. The evidence establishes that Messenger found herself in a position where she had to work at Lansing on her off weekend, when she was also scheduled to work at the hospital, because illness caused her to miss a day of work on the previous weekend. After being unable to switch her hours at Lansing, on both days Messenger made a request to her supervisor that she be allowed to leave about 30 minutes early if all her assigned work was finished. On Saturday, her request was granted and she left 30 minutes early without incident. On Sunday, the permission her immediate supervisor had granted was countermanded by Lyons and because she left early anyway she was terminated.

On both days, Messenger's supervisors had granted her requests to leave early and it was within their authority to do so.[11] The Respondent apparently concedes this but contends that because Lyons revoked that permission on Sunday, Messenger's leaving early that day constituted abandonment of her job and insubordination. Consequently, the lawfulness of Messenger's discharge turns on Lyons' motivation in revoking her permission to leave early. There is nothing in the record to establish that Lyons was in a better position to judge the staffing needs that afternoon than the supervisor who granted Messenger's request to leave early or that any emergency or other situation existed that required Messenger's presence during the last half-hour of the shift. In its brief, the Respondent seems to suggest that Tisko was misled into granting Messenger's request because she thought she had ''office approval.'' The evidence does not support this. Messenger's credible testimony was that when she made her requests to Tisko and Briggs for permission to leave early she did not say that she had approval to do so. She told them only that Wagner was aware of her job at the hospital. Briggs was not called as a witness. I do not credit Tisko's shifting testimony that Messenger told her she had approval to leave ''from the office.'' At first, Tisko's testimony corroborated that of Messenger that she had said that Wagner was ''aware'' of her job at the hospital. Tisko next testified that she told Lyons that Messenger told her ''the office had given her approval,'' but immediately recanted, saying: ''they didn't give her approval, they just knew about it, and was [sic] going to work around her schedule.'' Still later, when she was asked if she had given Messenger permission to leave early, she testified: ''with the knowing, and knowledge that she told me that she had, had the office approval.'' However, in a detailed report Tisko prepared immediately following the incident and which the Respondent apparently used as the basis for its decision to terminate Messenger, Tisko made no mention of Messenger's having said she had approval from the office or anyone else. On the contrary, on the report Tisko wrote that she told Lyons: ''I approved her leaving at 2:30 and Jackie did on Saturday.'' According to the report, after Tisko talked to Lyons and at his direction asked Messenger if she had written approval from Wagner or Mazzulli, Messenger said she did not, but ''they were aware of her schedule and were willing to work around it.''

In any event, Lyons never testified that he revoked Messenger's permission to leave early because she had misled Tisko. He testified that he did so because at their meeting on April 23, concerning Messenger's return to work and scheduling, he told Messenger that ''she'd have to work the schedule that was provided to her unless she was given some specific written permission by Samra or Carol, the schedulers, to alter it.'' According to Lyons, this was in accordance with a provision in the Respondent's employee handbook. However, what the pertinent portion of the employee handbook referred to by Lyons states is: ''Employees are not permitted to . . . change the work schedule before getting permission from their Supervisor.'' There is no requirement

[11] Tisko attempted to portray her authority to grant such requests as limited to situations involving health problems or emergency situations and said she would not have been able to permit an employee to leave early to go to another job without approval from higher authority. I do not credit that testimony. It is, in fact, exactly what she did and what Briggs did on the previous day.

that permission to leave early be in writing or that it come from Mazzulli or Wagner. Messenger did all that was required when she obtained permission to leave early from Tisko. If, in fact, Lyons had imposed a requirement on Messenger on April 23 that she get written permission from Mazzulli or Wagner before making any alteration in her assigned schedule, something that none of the three other persons who were at the meeting mentioned in their testimony,[12] it would have subjected Messenger to disparate and discriminatory treatment since there is no evidence any other employee was subject to the same requirement. Since it appears, and I find, that Lyons did not impose such a requirement on Messenger on April 23, his action on June 10 had no justification, was pretextual and amounted to desperate treatment and harassment of Messenger because of her support for the Union. Because Lyons' actions in revoking Messenger's permission to leave early and requiring her to stay until the end of her shift were unlawful, the Respondent cannot premise its discharge of Messenger on her failure to acquiesce in this discriminatory treatment. See *Joe's Plastics*, 287 NLRB 210, 211 (1987); *Crestfield Convalescent Home*, 287 NLRB 328 (1987).

In summary, I find that the Respondent has not established that it would have discharged Messenger in the absence of protected activity on her part. After Messenger had obtained permission to leave her shift early on June 10 in order to go to a second job, something that she was also permitted to do on June 9, Dennis Lyons learned of it and revoked that permission on the pretextual basis that Messenger had not obtained written permission from Wagner or Mazzulli. There was no evidence that the Respondent had a policy requiring such permission or that any other employee was required to get it in order to leave early. There was no evidence that Messenger's presence was needed or that Lyons had any reason for denying her permission to leave other than to harass and penalize her for her activities in support of the Union. I find the Respondent violated Section 8(a)(3) of the Act by discharging Virginia Messenger on June 12.[13]

IV. THE OBJECTIONS TO THE ELECTION IN CASE 8–RC–14289

The Union filed timely objections to the election conducted on April 12, 1990. In view of my findings in Cases 8–CA–22647 and 22792 that the Respondent committed numerous violations of Section 8(a)(1) of the Act in the manner described herein, most of which occurred during the period between the date of the filing of the Union's representation petition and the date of the election, I conclude that those unfair labor practices are sufficient to warrant setting aside the election. Likewise, I find that the Union's objections are meritorious to the extent they are consistent with the unfair labor practices found herein to have occurred during the critical period before the election.

CONCLUSIONS OF LAW

1. The Respondent, Health Care and Retirement Corp. of America, doing business as, Heartland of Lansing Nursing Home, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Coercively interrogating employees concerning their union sympathies and activities.

(b) Soliciting grievances with the implied promise of favorably adjusting those grievances in order to dissuade employees from supporting the Union.

(c) Threatening that an employee would lose her chances for advancement with the employer and ruin her chances for future employment elsewhere because of her support for the Union.

(d) Threatening an employee with loss of benefits if the Union was selected as the collective-bargaining representative of its employees.

(e) Telling an employee that if the Union got in a strike was inevitable, thereby leaving the impression that the employer would not bargain with it in good faith.

(f) Telling an employee that in the event of a strike she could not cross the picket line and would lose her job because her replacement would not leave.

(g) Implying that an employee could avoid reprisals by the employer by renouncing her support for the Union.

(h) Implying that it was futile for the employees to select the Union as their collective-bargaining representative.

(i) Threatening an employee with reduced working hours because of her support for the Union.

(j) Threatening an employee that her support for the Union would ruin her personal friendship with a supervisor.

(k) Threatening an employee with stricter enforcement of the employer's work rules because of the employees' support for the Union.

(l) Conducting surveillance of its employees' union activities in order to coerce and intimidate them.

(m) Maintaining an overbroad rule prohibiting solicitation in work areas other than immediate patient care areas and by discriminatorily enforcing a rule prohibiting campaigning for the Union in hallways while permitting campaigning against the Union in the same areas.

(n) Removing prounion literature from the breakroom and from a bulletin board where employees had previously been permitted to post information without restriction.

(o) Subjecting employees to verbal harassment and abuse because of their support for the Union.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) Discriminatorily changing employee Jane Reed's working conditions by prohibiting her from entering the kitchen during the course of her duties and requiring her to work under conditions intended to limit and restrict her contact with other employees because of her support for the Union.

[12] Wagner, Mazzulli, and Messenger all testified in detail about the April 23 meeting and none of them referred to any such requirement being imposed on Messenger at the meeting.

[13] The consolidated complaint alleges that Messenger's discharge also violated Sec. 8(a)(4) of the Act inasmuch as it occurred only a matter of days after the Union filed an amended charge naming Messenger as a discriminatee and the issuance of the original complaint in Case 8–CA–22647, which alleged that the Respondent had violated Sec. 8(a)(3) and (1) by denying Messenger's request to return to full-time work. While the timing of the Respondent's action is suspicious, there is insufficient evidence to establish that these occurrences prompted the Respondent to discharge her. In any event, the remedy would be the same.

(b) Issuing verbal warnings to Jane Reed and Raelynn Susi in order to retaliate against them because of their support for the Union.

(c) Discriminatorily changing employee Raelynn Susi's working conditions by requiring her to take her lunch and break periods at specific times in order to minimize her nonworking time contacts with other employees because of her support for the Union and requiring her to work uncompensated overtime and to do a supervisor's work so that the supervisor would have time to campaign against the Union.

(d) Discriminatorily delaying employee Virginia Messenger's return to work from an educational leave of absence, failing to return her to her day-shift position, refusing to arrange her work schedule to accommodate her class schedule as it had previously done, and reducing her hours of work because of her support for the Union.

(e) Discriminatorily discharging Virginia Messenger because of her support for the Union.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not engage in those unfair labor practices alleged in the consolidated complaint not specifically found herein.

7. The Union's objections have been sustained to the extent they involve the violations of Section 8(a)(1) found herein to have occurred during the critical period prior to the election and the Respondent has interfered with and illegally affected the results of the election conducted by the Board on April 12, 1990.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by delaying Virginia Messenger's return to work following an educational leave of absence, reducing her hours when she did return to work and discharging her on June 12, 1990, in order to discourage her from engaging in protected activities, I shall recommend that the Respondent be required to offer her immediate and full reinstatement to her former position of employment, or if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and to make her whole for any loss of earnings she may have suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I believe a broad cease-and-desist order is appropriate in this case in view of the Respondent's numerous, varied and egregious acts of misconduct which involved most of the top level of management at the Lansing facility, which continued on well after the election and which demonstrate a deliberate disregard of its employees' Section 7 rights. *Clark Manor Nursing Home Corp.*, 254 NLRB 455, 459 (1981); *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Health Care and Retirement Corp. of America d/b/a Heartland of Lansing Nursing Home, Bridgeport, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union activities or sympathies.

(b) Soliciting grievances with the implied promise of favorably adjusting those grievances in order to dissuade employees from supporting the Union.

(c) Threatening that employees will lose their chances for advancement or future employment because of their support for the Union.

(d) Threatening employees will lose benefits, that a strike is inevitable and that they will not get their jobs back in the event they select the Union as their collective-bargaining representative.

(e) Threatening employees with reduced working hours and the loss of personal friendship with supervisors because of their support for the Union.

(f) Telling employees or implying that their support for the Union is futile because they will not be any better off than they were without representation by the Union.

(g) Implying that employees can avoid reprisals by renouncing their support for the Union.

(h) Threatening employees with stricter enforcement of work rules because of their support for the Union.

(i) Conducting surveillance of employees' union or other protected activities.

(j) Enforcing rules prohibiting solicitation in its facility other than in immediate patient care areas and discriminatorily prohibiting campaigning for the Union in areas where campaigning against it is permitted.

(k) Removing or prohibiting prounion literature from break areas or on bulletin boards where other information is routinely allowed to be posted.

(l) Subjecting employees to verbal harassment or abuse because of their support for the Union.

(m) Requiring employees to do extra work or work uncompensated overtime so that supervisors will have time to campaign against the Union.

(n) Changing employees' hours and working conditions in order to retaliate against them for engaging in union or other protected activity or in order to limit their contact with other employees during nonworking time.

(o) Issuing verbal warnings to employees in order to retaliate against them for engaging in union or other protected activity.

(p) Delaying employees' return to work from leaves of absence, denying them the right to return to their former positions and/or reducing their working hours because they engage in union or other protected activities.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(q) Discharging employees in retaliation for their support of the Union.

(r) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to Virginia Messenger immediate and full reinstatement to her former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered because of the discrimination against her, plus interest. Backpay and interest due hereunder shall be computed in the manner described in the remedy section of this decision.

(b) Remove from its records all references to the verbal warnings issued to Raelynn Susi on April 13, 1990, and to Jane Reed on April 19, 1990, and the unlawful discharge of Virginia Messenger on June 12, 1990, and notify them that this is being done and that such actions will not be used against them in the future in any way.[15]

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this order.

(d) Post at its facilities in Bridgeport, Ohio, copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election in Case 8–RC–14289 be set aside and that said case be severed and remanded to the Regional Director for Region 8 for the purpose of conducting a new election. The Notice of Election shall contain the following paragraph, as provided in *Lufkin Rule Co.*, 147 NLRB 341 (1964):

NOTICE TO ALL VOTERS

> The election on April 12, 1990, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Election. All eligible voters should understand that the National Labor Relations Act gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

IT IS FURTHER ORDERED that the consolidated complaint be dismissed insofar as it alleges violations not specifically found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their union activities or sympathies.

WE WILL NOT solicit grievances from our employees with the implied promise that those grievances will be favorably adjusted in order to dissuade them from supporting United Food and Commercial Workers International Union, Local Union 23, AFL–CIO–CLC.

WE WILL NOT threaten our employees that they will lose their chances for advancement or future employment because of their support for the Union.

WE WILL NOT tell our employees that they will lose benefits and/or that a strike is inevitable and that they will not get their jobs back in the event they select the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees with reduced working hours or the loss of personal friendships with supervisors because of their support for the Union.

WE WILL NOT tell our employees or imply that their support for the Union is futile.

WE WILL NOT imply that employees can avoid reprisals by renouncing their support for the Union.

WE WILL NOT threaten our employees with stricter enforcement of work rules because of their support for the Union.

WE WILL NOT engage in surveillance of our employees' union or other protected activities.

WE WILL NOT enforce rules prohibiting solicitation in areas of our facility other than immediate care areas and

WE WILL NOT discriminatorily enforce rules prohibiting campaigning for the Union in areas where campaigning against the Union is allowed.

WE WILL NOT remove or prohibit prounion literature in break areas or on bulletin boards where other information is routinely allowed to be posted.

[15] *Sterling Sugars*, 261 NLRB 472 (1982).

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

WE WILL NOT subject our employees to verbal harassment or abuse because of their support for the Union.

WE WILL NOT require our employees to do extra work or work uncompensated overtime so that supervisors will have time to campaign against the Union.

WE WILL NOT change our employees' working hours or conditions in order to retaliate against them because of their support for the Union or in order to limit their nonworking time contacts with other employees.

WE WILL NOT issue verbal warnings to employees in order to retaliate against them because of their support for the Union.

WE WILL NOT delay our employees' return from leaves of absence, deny them their former positions and/or reduce their working hours in order to retaliate against them because of their support for the Union.

WE WILL NOT discharge our employees because they engage in union or other protected activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Virginia Messenger immediate and full reinstatement to her former position of employment, or if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or the other rights and privileges she previously enjoyed, and WE WILL make her whole for any loss of earnings she may have suffered because of our unlawful discrimination against her, with interest.

WE WILL remove from our records all references to the discharge of Virginia Messenger and the verbal warnings given to Raelynn Susi on April 13, 1990, and Jane Reed on April 19, 1990. WE WILL inform them this is being done and that they will not be used against them in the future in any way.

HEALTH CARE AND RETIREMENT CORP. D/B/A
HEARTLAND OF LANSING NURSING HOME